Supreme Court, U.S.
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No. 99-848

IN THE

Supreme Court of the United States

CRAIG BLAKE, *et al.*,

Petitioners,

v.

FRED WRIGHT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court consider overturning longstanding precedent and rule that the doctrine of qualified immunity may be applied only to constitutional claims, and not statutory claims, even where both claims arise from the same operative facts in the same case?

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STATEMENT OF THE CASE

This suit, filed by Petitioners, a group of police officers and their spouses, is based upon allegations that the installation and testing of a customary digital voice recording system in the City of Independence, Ohio's Police and Fire Departments violated their rights under the Federal Wiretap Act, 18 U.S.C. §§ 2510, *et seq.* ("Title III"), 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments, and the Ohio Wiretap Act, Ohio Revised Code §§ 2933.51, *et seq.* On October 28, 1996, Petitioners filed their suit against the City of Independence ("the City") and Respondent, Fred Wright ("Wright"), then Chief of Police, in his official and individual capacities, in the United States District Court for the Northern District of Ohio.

On November 18, 1996, Wright filed a Motion for a More Definite Statement and/or Motion to Dismiss, in his individual capacity, in the District Court. Wright asserted the affirmative defense of qualified immunity as grounds to dismiss all of the claims against him in his individual capacity. On July 16, 1997, the District Court denied Wright's motion to dismiss. Wright then appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit on July 28, 1997. In an Opinion issued June 15, 1999, the Sixth Circuit reversed the decision of the District Court and found that Wright, in his individual capacity, was entitled to qualified immunity on all of the claims, both constitutional and statutory, except for a claim raised in Paragraph 16 of the Complaint which related to actions other than those involving the digital voice logging system.

Petitioners filed a Motion for Rehearing or Rehearing En Banc with the Sixth Circuit, raising, for the *first time*,

the issue of application of qualified immunity to Title III statutory claims. The Sixth Circuit denied Petitioners' Motion for Rehearing and for Rehearing En Banc on August 19, 1999. Petitioners now seek a writ of certiorari from this Court.

SUMMARY OF ARGUMENT

In seeking to invoke this Court's discretionary jurisdiction, Petitioners fail to present any compelling reason for this Court to grant a writ of certiorari in this case. Petitioners attempt to conjure up compelling reasons to grant a writ by misconstruing the state of the law on the doctrine of qualified immunity and exaggerating the implications of the Sixth Circuit's decision. It is clear from this Court's precedent that qualified immunity is applicable to statutory claims, particularly where the statutory and constitutional claims are based on the same operative facts. Federal appellate and district courts have been applying qualified immunity to statutory claims for years. The Sixth Circuit's opinion was not, in any way, "revolutionary" as Petitioners suggest.

While Petitioners predict that applying qualified immunity to statutory claims will result in excessive interlocutory appeals and special treatment for public officials, qualified immunity has been applicable to statutory claims ever since *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), was decided 17 years ago. Obviously, Petitioners' predictions of doom are overstated, as the lower courts have dealt with qualified immunity on statutory claims for years without such results. To the contrary, if Petitioners' proposed interpretation of the qualified immunity doctrine is accepted, the judicial

system will be disrupted and public officials will be subject to unfair results and bifurcated proceedings if they are denied qualified immunity on statutory claims yet granted qualified immunity for constitutional claims based on the same operative facts in the same case. The promise of qualified immunity for public officials who act in good faith will be denied and the longstanding policy underlying qualified immunity to protect public officials from the burdens of litigation will be completely undermined.

Petitioners' alternative argument presents no viable issue at all because it has been waived and in any case is based on an erroneous premise. Petitioners' argument that qualified immunity should be denied when a statute is unambiguous fails because, in this case, the Sixth Circuit held that Title III and the Ohio Wiretap Act are not clear as applied to the facts presented here.

Because Petitioners' request for a writ of certiorari presents no important federal questions or compelling reasons for certiorari review, their Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. The doctrine of qualified immunity has been previously recognized as applying to statutory claims as well as constitutional claims and any purported conflict between the Sixth Circuit opinion and the District of Columbia Circuit's opinion on this issue does not warrant the granting of a writ of certiorari.

Petitioners seek to have this Court consider their contention that qualified immunity should not apply to

statutory claims, but only to constitutional claims. Although the Sixth Circuit addressed this issue in its Opinion, Petitioners never raised this issue either in their Brief to the Sixth Circuit or in the District Court. As such, it is evident that Petitioners all along assumed that Wright could obtain qualified immunity on both the constitutional and Title III claims, as they never questioned this issue until after the Sixth Circuit had rendered its decision. This fact, in and of itself, negates Petitioners' contention that the Sixth Circuit's decision was an extension of the qualified immunity doctrine, as they themselves never questioned its application below.

The history of the doctrine of qualified immunity reveals that it has long been widely accepted that its protections apply to both statutory and constitutional claims against public officials, especially where the claims stem from the same operative facts. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396, 410, this Court specifically held that qualified immunity applied to statutory claims, stating that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established *statutory* or constitutional rights of which a reasonable person would have known." *Id.* (emphasis added). In *Davis v. Scherer*, 468 U.S. 183, 104 S. Ct. 3012, 82 L. Ed. 2d 139 (1984), this Court also held that a public official does not lose qualified immunity on a constitutional claim merely because the official violated some statutory provision. *Id.* In so doing, the Court stated that qualified immunity applied to underlying statutory claims:

> [O]fficials may lose their immunity by violating "clearly established statutory . . . rights." 457 U.S., at 818, 73 L. Ed. 2d 396, 102 S. Ct 2727.

> This is the case where the plaintiff seeks to recover damages for violation of those statutory rights, as in Harlow itself, see id., at 820, n. 36, 73 L. Ed. 2d 396, 102 S. Ct. 2727, and as in many § 1983 suits, see e.g., Maine v. Thiboutot, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980) (holding that § 1983 creates cause of action against state officials for violating federal statutes.) For the reasons that we discuss, *officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of constitutional rights, do not forfeit their immunity by violating some other statute or regulation.* Rather, these officials become liable for damages only to the extent that there is a clear violation of the statutory rights that give rise to the cause of action for damages.

Id. at 194, n.12, 104 S. Ct. 3012, 82 L. Ed. 2d at 149 (emphasis added).

Petitioners' claim that no court has interpreted the language of *Harlow* as the Sixth Circuit has herein is belied by various decisions granting qualified immunity to public officials facing statutory claims. *See Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998) (applying qualified immunity to ADA and Section 504 claims); *Davis v. Zirkelbach*, 149 F.3d 614 (7th Cir. 1998) (applying qualified immunity to federal claims based upon § 1983 and the Federal Wiretap Act); and *Sinclair v. Schriber*, 916 F.2d 1109, 1114 (6th Cir. 1990) (noting that the district court found qualified immunity on Title III and Fourth Amendment claims and citing *Davis*). The Sixth Circuit opinion did not extend qualified immunity in an unprecedented manner in this case, but rather applied

the doctrine in accordance with logic, fairness and longstanding precedent. As such, a writ of certiorari is not appropriate on this issue because qualified immunity is, and has been for years, applicable in like circumstances.

Petitioners conjure up various suggested evils that they claim will befall the judicial system if this Court does not act. They claim that public officials will seek qualified immunity on all statutory claims, will seek interlocutory appeals in hoards when they are denied qualified immunity on these claims, and will unduly delay litigation. (Petition at p. 12). Petitioners' predictions of horrendous results are incorrect, as in the 17 years that qualified immunity has existed in its current form, courts have readily resolved qualified immunity questions on both constitutional and statutory claims without overburdening the judicial system.

Petitioners' broad overstatements need not be addressed by this Court under the facts of this case. This case does *not* present the issue of whether qualified immunity should be granted when only a statutory claim is raised against a public official, and thus this Court need not speculate on the consequences of a far-reaching rule that extends beyond the confines of the facts of this case. In the Complaint, Wright is alleged to have violated both constitutional and statutory provisions, and these alleged violations are based on the very same operative facts. Petitioners cannot and do not dispute that Wright can seek qualified immunity on the constitutional claims. Petitioners fail to recognize that their Fourth and Fourteenth Amendment claims are also "statutory" claims because they are based on a federal statute, 42 U.S.C. § 1983. Therefore, Petitioners' argument that qualified immunity should be denied on the Title III claim because it is a statutory claim fails to account for the fact that the constitutional claims are also based on a federal statute.

Wright is entitled to qualified immunity on the Title III claim because otherwise he would be obligated to proceed to discovery and trial on the statutory claim, even though it is based on the very same actions as the constitutional claims for which he is immune from such burdens. The Sixth Circuit opinion is an example of common sense application of the protections of qualified immunity which are intended to relieve public officials of the burdens of litigation. Contrary to Petitioners' contentions, not granting qualified immunity on the statutory claims would in fact cause greater chaos and lead to absurd results in suits involving public officials. If public officials in Wright's position are not entitled to qualified immunity on a statutory claim when it is based on the exact same facts as a constitutional claim, artful plaintiffs' counsel will attempt to use the back door to personally sue public officials by always pleading a federal statutory claim, along with any constitutional claims. Bifurcated and illogical paths would be created in which public officials will be subjected to discovery and trial on federal statutory claims, but granted qualified immunity on the constitutional claims based on the exact same conduct. This result will negate the policy upon which the doctrine of qualified immunity is based. *See Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411, 425 (1985) ("The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.").

The doctrine of qualified immunity was designed to treat public officials differently and to provide them with an *extra* layer of protection from claims made against them personally for their official actions. Qualified immunity is intended to "protect [public officials] 'from undue interference with their

duties and from potentially disabling threats of liability.' " *Elder v. Holloway*, 510 U.S. 510, 514, 114 S. Ct. 1019, 127 L. Ed. 2d 344 (1994) (citing *Harlow*, 457 U.S. at 806, 102 S. Ct. 2727, 73 L. Ed. 2d. at 403). *See also Harlow*, 457 U.S. 814, 102 S. Ct. 2727, 73 L. Ed. 2d at 408 (qualified immunity necessary to avoid the social costs of "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."). Thus, Petitioners' argument that the Sixth Circuit's holding will create an unfair dichotomy in which public officials receive special treatment has already been rejected by this Court.

Petitioners' assertion that the Sixth Circuit's decision conflicts with a D.C. Circuit decision, *Berry v. Funk*, 146 F.3d 1003 (D.C. Cir. 1998), does not justify a writ of certiorari. It is not at all clear that *Berry* is directly contrary to the Sixth Circuit decision. In fact, the court in *Berry* acknowledged that it had previously recognized qualified immunity against *both* constitutional and statutory claims, specifically Title III statutory claims. *Id.* at 1013. Because the *Berry* decision concedes that qualified immunity may apply to statutory claims, even, in some circumstances, claims under Title III, it cannot be said to be directly contrary to the Sixth Circuit's decision. Furthermore, Petitioners' reliance on the *Berry* decision as grounds for a writ of certiorari is unjustified as the *Berry* decision is a complete aberration from established qualified immunity doctrine. One anomalous decision, in contrast to well-established Supreme Court precedent, does not justify this Court's allocation of its limited time and resources to consideration of this issue.

Effectively conceding that their first argument is unconvincing, Petitioners raise an alternative argument

acknowledging that qualified immunity applies to statutory claims but asserting, in novel fashion, that the doctrine should not be applied if, in someone's mind, the statute is "unambiguous." As an initial matter, because this argument was never raised or addressed in the courts below, Petitioners have waived this argument. *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346 (1973).

Moreover, Petitioners' suggested standard is not applicable in this case, as is clear from the Sixth Circuit's decision itself. The Sixth Circuit stated:

> This court has not discovered case law that discusses the good faith defense of Title III with respect to a similar statutory provision, let alone the administrative exception of the Ohio statute. Nor has Ohio or federal law fully explained the meaning of "statutory authorization" under Title III.

(Sixth Circuit Decision at p. 17.) Since the Sixth Circuit found that Title III and the Ohio Wiretap Act have not been fully clarified, particularly as they apply to the facts at issue here, Petitioners' premise contains a fatal flaw. Indeed, the Sixth Circuit is not the only court to have found provisions of the Federal Wiretap Act unclear. In *Forsyth v. Barr*, 19 F.3d 1527, 1543 (5th Cir. 1994), the court remarked in its opinion that "Because the plain wording of the [Wiretap] Act does not address the situation at hand, we must engage in statutory construction. In so doing we are aware . . . that construction of the Federal Wiretap Act is fraught with trip wires." *See also Fleming v. United States*, 547 F. 2d 872, 873 (5th Cir. 1977) ("Our analysis . . . makes us confident of only one conclusion: the statute is not a model of clarity").

CONCLUSION

None of the arguments set forth by Petitioners in support of a writ of certiorari present viable or compelling reasons to warrant a writ. Petitioners' argument that qualified immunity should not apply to statutory claims need not be addressed in this case where Wright is alleged to have violated both constitutional and statutory claims. It would be illogical to grant qualified immunity on the constitutional claims but not on the statutory claims, thereby forcing Wright to fully litigate this case, when both claims are based on the same operative facts. Moreover, this Court has indicated that qualified immunity is available on statutory claims. Finally, Petitioners' claim that qualified immunity should only apply to ambiguous statutes fails here because the Sixth Circuit in fact found that Title III and the Ohio Wiretap Act, as applicable to the facts of this case, have not been fully explained. Because the Sixth Circuit's opinion is consistent with Supreme Court precedent and because it does not raise any important federal questions of a compelling nature, a writ of certiorari is not warranted. For these reasons, a writ of certiorari is not justified, and Petitioners' request should be denied.

Respectfully submitted,

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